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August 14, 1928

Attorney General

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CONCORD, N.H.

Robert W. Merrill, Sheriff, Town of  
Department of Public Works and Highways

Dear Sir:

Re: Leonard Bailey of the Right of Way  
Company, Inc. (hereinafter referred to as "the company") who has been  
in the process of acquiring of Right of Way in New Hampshire which  
is a part of the highway of the New England Toll Road and which is  
to be used for a toll road.

It is noted that you have situations where  
the company is acquiring Right of Way in situations where there is no  
roadway and no road and the company is acquiring the land and is perfectly  
within the power to put down the highway into his field.

This problem was thoroughly covered by our  
opinion dated in 1921 in a case which went to the Supreme Court three  
times in *State v. Bailey*, 100 N.H. 40, 80 N.H. 223, and 81 N.H.  
in the various cases in which it was  
decided.

200 N.H. at pp. 45 and 46:

"The shutting property owner may make any reasonable  
use of the street which will not interfere with the enjoyment  
of the use of it by the public and to the public interest increases  
his rights are now lost. . . .

It is not in every case of the shutting incident to his  
property of necessity a right on a street . . . is his right  
of access, i.e., his right of ingress and egress. . . . It in-  
cludes not merely the right of the shutting owner to go into  
and come out of his premises but also the right to have the  
premises accessible to customers, clients, and customers. . . .

The shutting owner, subject to municipal regulation, has  
the right to construct a driveway from his property to the  
public highway of the highway, provided of course he does not  
unreasonably interfere with the public use of the street."  
100 N.H. 40, 80 N.H. 223, 81 N.H. 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The right of access, though a private right, may of course  
be limited by public regulations, but it cannot be totally destroyed  
as to the owner's right to access of land. *State v. Bailey*,  
100 N.H. 40, 80 N.H. 223, 81 N.H. 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

August 14, 1953

George F. Nelson

Frank D. Merrill, Commissioner

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84 N.H., at p. 46:

"The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States; and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy." Harmon v. New York, 106 U.S. 526, 533.

"In Palmer v. Colcord, 50 N.H. 7, 8, Chief Justice Doe declared: 'The doctrines of reasonable necessity, reasonable care, and reasonable use prevail in this state in a liberal form, on a broad basis of general principle.' See also Gann v. Wolfe, 75 N.H. 79; Winn v. Walbridge, 81 N. H. 314, and cases cited.

"The owner of land may put it to any use which is reasonable, considering his interest and that of the other persons affected by it." Ward v. Blackthorn, 73 N.H. 253. 'In this state the question of reasonable conduct, whether in relation to forcible wrongs or to intangible rights, is one of fact.' Ward v. Lincoln, 75 N.H. 315, 322."

84 N.H., at p. 47.

"Two of the specific questions involved in the issue of reasonableness are whether the use which the defendant intends to make of his right of access will obstruct public travel unreasonably (Ward v. Lincoln, 75 N.H. 322, 325; Gann v. Walbridge, 75 N.H. 327, 335; Winn v. Winn, 62 N.H. 123, 124) and whether it is such a use as the ordinary man would make of his premises (Ward v. Blackthorn, supra; Gann v. Walbridge, supra; Winn v. Walbridge, supra). The issue is not to be decided by a consideration of the demands of the traveling public alone. . . . Every driveway and every cross street involves a similar danger of accident if travelers fail to exercise due care, and only in a case where this danger

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Case - 1. 1200

Re: D. Merrill, Commissioner

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is modified by unusual elements of hazard would a denial of the right to a passing be justified. In short, no single factor, no particular right, here controls; but all aspects of the situation must be taken into account before it can be said that the defendant's supposed use of his right of access exceeds what would be reasonable under the circumstances."

Id. N.H., at pp. 377 and 400:

"... The width of the sidewalk is eleven feet and that of the adjacent way twenty. In view of the necessary limitation of the space of a departing car about to make a right angle turn into traffic, the danger to pedestrians would seem to be no greater than that which is ordinarily incident to the use of the streets in any of our thickly settled villages or cities. There, of course, knowledge, there are numerous public and private ways with less opportunity for self-protection than here. We have to conclude that the situation presents no such unusual hazard to pedestrians as to justify an order denying the owner access to the street for the contemplated use of his property. Wilson v. Thompson, 133, 47. In fact the finding that such use is unreasonable seems to be based, not so much upon any direct evidence to the public, as it is on a supposed absence of any advantage to the owner, for the court finds that 'auto-traffic entering at Point A, after being served, could leave by way of School Street as well as by way of Main Street; that an exit into Main Street is not necessary so far as traffic from School Street is concerned and would not be of any benefit to the defendant.' The conclusion is a non sequitur. While the relative advantages and disadvantages to the parties are elements to be weighed in determining the reasonableness of a use of property, Shelton v. City of Portland (11.; see Smith v. Hillman, 101 N.H. 91, 95, 96), the convenience as well as the necessity of the owner entitles him to access and egress to and from his land at all points in the absence of some peril to the public out of the ordinary."

C O P Y

August 14, 1933

George F. Tolson

Re: R. Merrill, Complainant

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33 U.S., at pp. 133 and 140:

The defendant contends that he is entitled to an easement for a driveway as it has been found on the recorded record that without it he cannot profitably carry on the business which he proposes to transact. The answer to this contention is that the fact of the proposed character of the proposed use is to be found, not by inquiring whether such use is essential to the profitable transaction of any particular business on his lot, but in answer to the inquiry whether such use would be fraught with such unusual hazard that the danger to the traveling public would be cut off by the denial to the defendant to the owner by being deprived of it. The convenience or necessity of the owner constitutes but one side of the equation. Here, then, the character of the use and the responsibility of his lot at other points are material factors. For instance, it would be difficult to conceive of a situation where an owner should be deprived of access to his lot by means of an easement at any point on a bounding street however extensive his frontage; or the other hand, if an owner should propose to permit freight or vehicles with great force or speed across a congested sidewalk or crosswalk, such use would be clearly unreasonable even though it was the only accessible entrance to his lot. Between such extremes a great variety of situations may arise in which the relative rights of the owner and the traveling public can be determined by the balancing of factors, but in which the reasonableness of the proposed use must be determined by weighing its unusual danger to the public against the inconvenience and disfigurement to the owner which it entails. Milroy v. Thomas, 284 U.S. 133, 140. "In short, no single factor, no particular right, here controls; but all aspects of the situation must be taken into account . . ." Milroy v. Thomas, 284 U.S. 143, 147."

In short, I must advise you that every such property's rights stand upon their own individual set of facts and no general rule can be laid down for your guidance beyond the above expressions of the court's opinion.

Very truly yours,

George F. Tolson  
Assistant Attorney General

CC: Mr. Tolson

Mr. Bailey